

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAHESH KUMAR PATHAK,

Petitioner,

v.

MICHAEL CHERTOFF, et al.,

Respondents.

NO. C07-4691 TEH

ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS

Petitioner Mahesh Kumar Pathak has been ordered removed from the United States. Pending his removal to India, he has been detained by United States Immigration and Customs Enforcement (“ICE”) since August 3, 2007. Petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, directing his release from custody. Respondents filed a timely answer, and Petitioner filed a timely traverse.

After reviewing the parties’ initial briefs, the Court ordered supplemental briefing on March 21, 2008. The government filed timely supplemental declarations on April 7, 2008. Petitioner was allowed until April 14, 2008, to respond to these declarations but did not file any response. Upon careful consideration of the parties’ arguments, the record presented, and governing law, the Court now DENIES the petition for a writ of habeas corpus for the reasons discussed below.

BACKGROUND

Petitioner, a native and citizen of India, entered the United States on May 20, 2000. He filed an application for asylum and withholding of removal on October 14, 2000. An immigration judge denied Petitioner’s application on April 30, 2003, and the Board of Immigration Appeals (“BIA”) affirmed that decision on March 16, 2004. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which stayed Petitioner’s

1 removal pending appeal. On October 27, 2006, the Ninth Circuit affirmed the portions of the
2 BIA's decision over which the court had jurisdiction and issued its mandate on February 2,
3 2007. On July 23, 2007, Petitioner filed a motion to reopen his case and to stay removal
4 before the BIA due to a purported fundamental change in law. The BIA denied that motion
5 on October 31, 2007.

6 While Petitioner's appeals were pending, his wife, Diane Evans Pathak, a United
7 States citizen, petitioned for immediate relative status for Petitioner as her spouse. However,
8 although Mrs. Pathak appeared for the scheduled interview with United States Citizenship
9 and Immigration Services on April 16, 2007, Petitioner did not. The government therefore
10 denied the petition due to abandonment on April 20, 2007. On July 23, 2007, Petitioner's
11 wife filed a second petition for relative status; despite being ordered to do so on March 21,
12 2008, the parties provided no information on the status of this second petition.

13 On May 1, 2007, Petitioner was ordered to appear on June 5, 2007, for deportation to
14 India. Petitioner failed to appear. He was finally brought into ICE custody on August 3,
15 2007, after being apprehended by the fugitive operations unit at his cousin's residence.

16 17 **DISCUSSION**

18 This Court has jurisdiction under 28 U.S.C. § 2241 over Petitioner's claims that he is
19 being unlawfully detained. *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001). Although the
20 petition also discusses issues relevant to Petitioner's asylum claims, Petitioner concedes that
21 he is barred from challenging his removal order in this Court by the REAL ID Act of 2005.
22 *Traverse* at 2 n.1.

23 Once an alien has been ordered removed, "the Attorney General shall remove the
24 alien from the United States within a period of 90 days (in this section referred to as the
25 'removal period')." 8 U.S.C. § 1231(a)(1)(A). The parties agree that the removal period
26 began to run in this case on February 2, 2007, when the Ninth Circuit issued its mandate. *See*
27 8 U.S.C. § 1231(a)(1)(B)(ii) (providing that "[i]f the removal order is judicially reviewed and
28 if a court orders a stay of the removal of the alien, [the removal period begins to run on] the

1 date of the court's final order"). "The removal period shall be extended beyond a period of
 2 90 days and the alien may remain in detention during such extended period if the alien fails
 3 or refuses to make timely application in good faith for travel or other documents necessary to
 4 the alien's departure or conspires or acts to prevent the alien's removal subject to an order of
 5 removal." 8 U.S.C. § 1231(a)(1)(C).

6 The Supreme Court has held that detention for a total period of six months is
 7 presumptively valid. *Zadvydas*, 533 U.S. at 701. The Court further explained that:

8 After this 6-month period, once the alien provides good reason to
 9 believe that there is no significant likelihood of removal in the
 10 reasonably foreseeable future, the Government must respond with
 11 evidence sufficient to rebut that showing. And for detention to
 12 remain reasonable, as the period of prior postremoval confinement
 13 grows, what counts as the "reasonably foreseeable future" conversely
 14 would have to shrink. This 6-month presumption, of course, does not
 15 mean that every alien not removed must be released after six months.
 16 To the contrary, an alien may be held in confinement until it has been
 17 determined that there is no significant likelihood of removal in the
 18 reasonably foreseeable future.

14 *Id.*


15 Petitioner in this case has been in custody for longer than six months. However, as
 16 documented in the supplemental declarations filed by the government on April 7, 2008, the
 17 government began the process of obtaining travel documents for Petitioner on August 9,
 18 2007, and has been diligently following up with Indian Embassy officials since that time.
 19 Acala Decl. ¶ 5; Potvin Decl. ¶¶ 4-13. In addition, on April 2, 2008, the government
 20 received travel documents from the Indian Embassy in Washington, D.C., and is currently
 21 "making arrangements for Mr. Pathak's imminent removal from the United States." Potvin
 22 Decl. ¶ 15 & Ex. B. Petitioner has failed to set forth any reason why India will refuse to
 23 accept Petitioner upon removal, nor has he provided any other "reason to believe that there is
 24 no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533
 25 U.S. at 701. Consequently, the Court finds that Petitioner's detention continues to be
 26 reasonable and lawful under 8 U.S.C. § 1231(a), and habeas relief under 28 U.S.C. § 2241 is
 27 therefore unwarranted.

1 **CONCLUSION**

2 Accordingly, with good cause appearing for the reasons discussed above, the petition
3 for writ of habeas corpus is DENIED. The Clerk shall enter judgment and close the file.
4

5 **IT IS SO ORDERED.**

6
7 Dated: 04/15/08



THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT